Original
Supreme Court, U.S.
FILED
OCT 1 1998
CLERK

ORIGINAL

No. 98-292

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

ARTHUR CALDERON, WARDEN, *Petitioner*

v.

JOHN GEORGE BROWN, *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS FOR THE PURPOSE OF FILING A BRIEF IN OPPOSITION (CAPITAL CASE)

AND

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI (CAPITAL CASE)

JOHN GEORGE BROWN BN 1820372
Orange County Jail
550 North Flower
Santa Ana, California, 92701

MICHAEL M. CRAIN
Attorney at Law
12301 Wilshire Blvd.
Suite 550
Los Angeles CA 90025

No. 98-292

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

ARTHUR CALDERON, WARDEN, *Petitioner*

v.

JOHN GEORGE BROWN, *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS FOR THE PURPOSE OF FILING A BRIEF IN OPPOSITION (CAPITAL CASE)

AND

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI (CAPITAL CASE)

JOHN GEORGE BROWN BN 1820372
Orange County Jail
550 North Flower
Santa Ana, California, 92701

No. 98-292

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

ARTHUR CALDERON, WARDEN, *Petitioner*

v.

JOHN GEORGE BROWN, *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS FOR THE PURPOSE OF FILING A BRIEF IN OPPOSITION (CAPITAL CASE)

JOHN GEORGE BROWN, BN 1820372
Orange County Jail
550 North Flower
Santa Ana, California, 92701

No. 98-292

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

ARTHUR CALDERON, WARDEN, *Petitioner*

v.

JOHN GEORGE BROWN, *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS (CAPITAL CASE)

Respondent John George Brown hereby files his Motion for Leave to Proceed In Forma Pauperis (Capital Case). This Motion is filed pursuant to Rule 39 of the Rules of the Supreme Court of the United States. It is based on the attached Declaration of John George Brown.

DATED: 9-14-98

John George Brown
JOHN GEORGE BROWN, Respondent

DECLARATION OF JOHN GEORGE BROWN

I, John George Brown, declare under penalty of perjury as follows:

1. I am the Respondent in the case of Arthur Calderon, Petitioner, v. John George Brown, Respondent., No. 98-292, currently before this Court on a Petition for Writ of Certiorari filed on or about August 17, 1998 on behalf of Warden Arthur Calderon by Daniel E. Lundgren, Attorney General of the State of California.

I am an inmate of the Orange County Jail, Booking Identification Number 1820372, Orange County Jail, 550 North Flower, Santa Ana, California, 92701.

I am indigent and not represented by counsel in proceedings before this Court. I hereby request leave to proceed in forma pauperis, in order to file a Brief in Opposition to the Petition for Writ of Certiorari.

The California Supreme Court issued a Writ of Habeas Corpus in my case. In Re Brown, 17 Cal.4th 873 (1998). As a result, Petitioner Calderon has now filed a Petition for Writ of Certiorari. I seek leave to file in forma pauperis a Brief in Opposition to his Petition. This brief in Opposition is attached to this Motion and has been prepared by Michael M. Crain, an attorney licensed to practice in the State of California.

Mr. Crain, Law Office of Michael M. Crain, 12301 Wilshire Blvd., Suite 550, Los Angeles, California, 90025, (310) 826-5124, is my appointed counsel in related habeas corpus proceedings in

Brown v. Calderon, et al., CV 90-2815 RAP, currently pending in the United States District Court for the Central District of California. Those proceedings have been stayed. Mr. Crain was appointed under the Criminal Justice Act of 1964, 18 U.S.C. §3006A, which excuses me from filing this declaration in notarized form.

Mr. Crain also has been my counsel in proceedings before the California Supreme Court which gave rise to the present Petition for Writ of Certiorari before this Court. Those proceedings are the result of an "exhaustion petition" filed in the California Supreme Court on February 15, 1994, after the Petition for Writ of Certiorari was filed in Brown v. Calderon, et al., CV 90-2815 RAP on or about November 4, 1991. That "exhaustion petition" alleged several claims for relief. In its decision in In Re Brown, supra, 17 Cal.4th 873 (1988), the California Supreme Court granted relief only on the claim made pursuant to Brady v. Maryland, 373 U.S. 83 (1963), and by order of September 7, 1994 held the other claims in abeyance. The California Supreme Court has not yet ruled on those other claims.

Meanwhile, as a result of the California Supreme Court's order in In Re Brown, supra, 17 Cal.4th 873 (1998), issuing a writ of habeas corpus, I have been transferred from the California State Prison at San Quentin to the Orange County (California) Jail. I am awaiting retrial on the capital murder charges on which relief was granted in In Re Brown, supra. My trial counsel there is the

Orange County Public Defender, 901 Civic Center Drive, Suite 200 Santa Ana, California 92703, (714) 773-4500.

DATED: 9-14-98

John George Brown
JOHN GEORGE BROWN, Respondent

No. 98-292

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

ARTHUR CALDERON, WARDEN, *Petitioner*

v.

JOHN GEORGE BROWN, *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI (CAPITAL CASE)

MICHAEL M. CRAIN, ESQ.
LAW OFFICES OF MICHAEL M. CRAIN
12301 WILSHIRE BLVD., SUITE 550
LOS ANGELES, CALIFORNIA 90025
(310) 826-5124

(CAPITAL CASE)

QUESTION PRESENTED

Did the state's highest court properly reduce Respondent's capital murder conviction to second degree murder, and impose a sentence of life in prison rather than death, unless the prosecution should choose to re-try him, based on the state court's factual and legal findings -- made in light of an evidentiary hearing -- that the prosecution (a) failed to disclose the exculpatory results of laboratory tests on Respondent's blood, which would have supported a credible mens rea defense; and (b) misled the jury to believe that the laboratory test results were inculpatory?

PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 2

ARGUMENT 2

I. PETITIONER HAS SHOWN NO REASON WHY A WRIT OF CERTIORARI SHOULD BE GRANTED UNDER RULE 10 2

II. PETITIONER HAS MISREPRESENTED THE FACTS AND APPLICABLE LAW AND HAS CAST THE CALIFORNIA SUPREME COURT'S DECISION IN A FALSE LIGHT 3

A. Summary of the California Supreme Court Decision In In Re Brown, 17 Cal.4th 873, (1998) 3

B. The Petition Misrepresents The Reason Why The California Supreme Court Issued The Writ Of Habeas Corpus 5

C. The Petition Misrepresents the Nature of the Exculpatory Evidence 6

CONCLUSION 11

TABLE OF AUTHORITIES

Page

Cases Cited:

Federal Cases

Arizona v. Youngblood
488 U.S. 51 (1988) 11
109 S.Ct. 333
102 L.Ed.2d 281

Brady v. Maryland
373 U.S. 83
83 S.Ct.1194
10 L.Ed.2d 215 (1963) 1, 2, 7, 8, 9, 10

Kyles v. Whitley
514 U.S. 419
115 S.Ct. 1555
131 L.Ed 2d 490 (1995) 1, 2, 5

Lugo v. Munoz
682 F.2d 7 (1st Cir. 1982) 8

United States v. Agurs
427 U.S. 97, 111 (1976) 6, 8, 11
96 S.Ct. 2392
49 L.Ed. 342

United States v. Aichele
941 F.2d 761 (9th Cir. 1991) 10

United States v. Brown
628 F.2d 471 (5th Cir. 1980) 8

United States v. Griggs
713 F.2d 672 (11th Cir. 1983) 9

United States v. Hicks
848 F.2d 1 (1st Cir. 1988) 10

United States v. LeRoy,
687 F.2d 610 (2nd Cir. 1982)1 10

United States v. Morris
80 F.3d 1151 (7th Cir. 1996) 9

United States v. White
970 F.2d 328 (7th Cir. 1992) 9

United States v. Wilson
901 F.2d 378 (4th Cir. 1990) 9

California Cases

In Re Brown
17 Cal.4th 873
952 P.2d 715
72 Cal.Rptr.2d 698 (1998) 1, 3, 4, 5, 6, 7

Other State Cases

State v. Beaty
158 Arizona 232 (1988) 10

Turner v. State, 684 N.E.2d 564 (1997) 11

STATEMENT OF THE CASE

Respondent was convicted of murder and sentenced to death. He subsequently filed a petition for writ of habeas corpus in the California Supreme Court, alleging that the prosecution had violated its duty under Brady v. Maryland 373 U.S. 83 (1963) and Kyles v. Whitley 514 U.S. 419 (1995) to disclose material exculpatory evidence to the defense. That evidence was the result of a blood test conducted by the prosecution, which showed that, at the time of his arrest shortly after the crime, Respondent had phencyclidine (PCP) in his blood.

In response to the petition for writ of habeas corpus, the California Supreme Court ordered an evidentiary hearing and appointed a referee to hear testimony. Following that hearing, briefing and argument, the Supreme Court granted Respondent relief by reducing his capital murder conviction to a conviction of second degree murder, and reducing his death sentence to a sentence of life imprisonment, unless the prosection should choose to retry him. In Re Brown, 17 Cal.4th 873 (1998). The state court held that the test result showing PCP in Respondent's blood was material exculpatory evidence, that the prosecution had failed to disclose it to the defense, and that Respondent was prejudiced by this failure to disclose. In Re Brown, supra, 17 Cal.4th at 888-91. The Court found prejudice in that the evidence of the test result would have been the cornerstone of the trial defense of diminished capacity, would have diffused or negated prosecution rebuttal

evidence, and would have prevented the prosecution from arguing to the jury, as it did, that its own laboratory test proved that Respondent had no drugs in his blood and therefore could not have been under their influence at the time of the crime. Id., 17 Cal.4th at 876, 888-91.

ARGUMENT

I.

PETITIONER HAS SHOWN NO REASON WHY A WRIT OF CERTIORARI SHOULD BE GRANTED UNDER RULE 10

Rule 10 of the Rules of the Supreme Court of the United States provides that review on a writ of certiorari is "not a matter of right, but of judicial discretion" and will be granted only for "compelling reasons."

Petitioner has failed to show any "compelling reasons" for the granting of his Petition for Writ of Certiorari. At most, Petitioner merely contends that the California Supreme Court made erroneous factual findings or misapplied a properly stated rule of law. Rule 10, supra, states that such contentions do not compel the grant of a writ of certiorari. Moreover, these contentions are unsupported by the record. In issuing its writ of habeas corpus, the California Supreme Court applied to a set of facts which it found to be true the well-established rules of Brady v. Maryland, 373 U.S. 83 (1963), and Kyles v. Whitley, 514 U.S. 419 (1995). As will be seen, in his Petition to this Court Petitioner misrepresents the facts before the California Supreme Court and

asks this Court to reweigh the evidence it considered. Petitioner can point to no case, statute, or court rule that authorizes the grant of a petition for writ of certiorari in such circumstances.

II.

THE PETITIONER MISREPRESENTS THE FACTS AND APPLICABLE LAW AND CASTS THE CALIFORNIA SUPREME COURT'S DECISION IN A FALSE LIGHT

A. Summary of the California Supreme Court Decision In In Re Brown, 17 Cal.4th 873 (1998)

Respondent Brown was charged with capital murder. Following his arrest, the prosecution took a sample of blood from him. It conducted two laboratory tests on the sample to determine whether it contained drugs. One test, the gas chromatograph mass spectrometer (GC/MS), did not detect phencyclidine (PCP). A second test, the radioactive immunoassay (RIA), showed that the blood contained PCP. Although the prosecution responded to the defense's request for the disclosure of exculpatory evidence by revealing to it the GC/MS test result, it did not disclose the RIA test result which showed that Respondent had PCP in his blood. In Re Brown, supra, 17 Cal.4th at 877-83.

At trial, the defense was lack of requisite mental state based on Respondent's diminished capacity. Because the prosecution had failed to disclose the prosecution's laboratory report of the positive PCP test result, Respondent was unable to present this exculpatory scientific evidence to the jury. To make matters worse, the prosecution presented evidence that it had tested Respondent's blood and determined that it did not contain PCP. In

final argument, the prosecution told the jury that its testing of Respondent's blood revealed that it contained no drugs at all and argued that this refuted the defense expert's opinion that Respondent suffered from diminished capacity at the time of the crime. Id. 17 Cal.4th at 876, 888-91. Respondent was convicted of murder and sentenced to death. Id., 17 Cal.4th at 876.

Thereafter, Respondent sought a writ of habeas corpus in the California Supreme Court, alleging that the prosecution had failed to disclose to the defense that the RIA test showed that Respondent had PCP in his blood and that this had denied him a fair trial.

The California Supreme Court issued an order to show cause and ordered an evidentiary hearing. Based on the evidence adduced at that hearing, the California Supreme Court determined, as a matter of fact and law, that the test result was material exculpatory evidence which the prosecution had failed to disclose. In Re Brown, supra, 17 Cal.4th at 891.

The California Supreme Court further held that the failure to disclose the exculpatory evidence was prejudicial to Respondent because it would have been the "linchpin" of his defense of diminished capacity, it would have enhanced and corroborated other evidence of intoxication offered by the defense, it would have "diffused or negated" the prosecution's rebuttal evidence, and it would have prevented the prosecutor from arguing to the jury, as he did, that the prosecution's own testing of Respondent's blood proved that it did not contain drugs and that therefore he could not have been under their influence at the time of the crime.

(Id., 17 Cal.4th at 876, 888-91.)

In issuing the writ of habeas corpus, the Court held that the "nondisclosure prevented [Respondent] from presenting a credible defense of diminished capacity, thereby denying him a fair trial," and that the "favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict," citing Kyles v. Whitley, 514 U.S. 419, 435 (1995). In Re Brown, supra, 17 Cal.4th at 890.

B. The Petition Misrepresents The Reason Why The California Supreme Court Issued The Writ Of Habeas Corpus

Petitioner claims that the California Supreme Court granted relief "because" it found that the prosecution "had unintentionally failed to make certain that the defense had a copy" of the positive for PCP blood test result and that it "acknowledged" that the prosecution crime laboratory had sent the report of the positive test result "to the defense through the county run mail system." (Petition for Writ of Certiorari, pp. 4, 14). These assertions are made without citation to the California Supreme Court's opinion in In Re Brown, supra, 17 Cal.4th 873 (1998), and are false.

Nowhere in its opinion in In Re Brown does the Court "acknowledge" or find any such thing to be true. To the contrary, the Court found as a matter of fact that "neither Petitioner (Brown) nor anyone working on his behalf" received the test result, and that, although the prosecutor had a duty to disclose the

exculpatory evidence to the defense, he "failed to do so." In Re Brown, supra, 17 Cal.4th at 880, 883.

C. The Petition Misrepresents the Nature of the Exculpatory Evidence

As the California Supreme Court found, the prosecution tested Respondent's blood in its own laboratory and found that it contained PCP. It did not disclose this test result to the defense. The prosecution capitalized on its failure to disclose by presenting evidence that its laboratory had tested Respondent's blood and determined that it did not contain PCP and thereafter arguing to the jury that its own testing of the blood showed that no drugs were present and that this proved that the defense expert's opinion that Respondent was under the influence of drugs was unworthy of belief. In Re Brown, supra, 17 Cal.4th 876, 888-91.

In a criminal case the prosecution has a constitutional "obligation to disclose exculpatory evidence." United States v. Agurs, 427 U.S. 97, 111 (1976). This obligation exists to ensure that "evidence highly probative of innocence is presented to the jury." Id. 427 U.S. at 110. The California Supreme Court found that the test result, generated by the prosecution, maintained in the prosecution's files, and not disclosed to the defense, was not merely material, but critical exculpatory evidence. In Re Brown, supra, 17 Cal.4th at 888-91.

Not liking this finding, Petitioner attempts to sidestep it by mischaracterizing the exculpatory evidence as being not the positive test result, but Respondent's blood itself. (Petition for Writ of Certiorari, pp. 7-13). From this false premise, Petitioner argues that Respondent could have tested the blood himself and offered the result of such test in evidence. (Petition For Writ of Certiorari, pp. 7-13). To put it charitably, this is a red herring.

Whether or not Respondent could have done so does not diminish the Brady violation at all. Petitioner's failure to disclose the positive for PCP test result prevented the defense from presenting to the jury evidence that the prosecution's own laboratory, so highly touted by the prosecution itself (In Re Brown, supra, 17 Cal.4th at 890) had found drugs in Respondent's blood. Unlike evidence of a test performed by the defense, the prosecution's exculpatory test result was not subject to charges of defense bias or lack of reliability. Moreover, the prosecution's positive test result would be highly corroborative evidence of any positive test result obtained by the defense.

In support of his argument that the prosecution's failure to disclose the positive test result was not a Brady violation, Petitioner argues that no such violation occurs if the prosecution fails to disclose exculpatory evidence "available to the defense through the exercise of reasonable diligence." Petition for Writ of Certiorari, p.10). Of course, the true exculpatory evidence -- the positive test result obtained by the prosecution's own

laboratory -- was "available to the prosecution and not submitted to the defense" and was not evidence "found in a neutral source." United States v. Agurs, supra, 427 U.S. at 111. The failure to disclose it was a classic Brady violation. It is only by mischaracterizing the nature of the exculpatory evidence that Petitioner can make the fatuous argument he does that exculpatory evidence was available to the defense.

Petitioner's sleight of hand is exposed for what it is by a review of the cases he cites in support of this argument. Each of them involves exculpatory evidence which, if material at all, was known to the accused, or was in his possession, or was in the possession of a "neutral source," and therefore equally available to both sides.

None of them involves evidence such as the test result in this case, generated by the prosecution, and kept secret in the prosecution's files. In short, each case Petitioner cites is inapposite.

In Lugo v. Munoz, 682 F.2d 7 (1st Cir. 1982), the main prosecution witness was one Yaco. The prosecution did not tell the defense that, in a pending criminal case against Yaco, the court had ordered him to undergo a psychiatric examination. There was no Brady violation because the court order was a matter of public record and the defense could have obtained it on its own.

In United States v. Brown, 628 F.2d 471 (5th Cir. 1980), a tax fraud prosecution, the appellant claimed that the prosecution had not disclosed exculpatory evidence in an Internal Revenue Service

file. There was no Brady violation because all relevant evidence in the file was introduced at trial and was therefore available to the appellant.

In United States v. Griggs, 713 F.2d 672 (11th Cir. 1983), the evidence showed that the defense, which elicited arguably exculpatory evidence on cross-examination, actually knew before trial the information claimed to be withheld.

In United States v. White, 970 F.2d 328 (7th Cir. 1992), a bankruptcy fraud prosecution, the appellant argued that the prosecution withheld notes copied from a bankruptcy file. There was no Brady violation because the appellant had access to the file and could have copied it himself. Moreover, he had copied some of the file and offered it into evidence at trial.

In United States v. Morris, 80 F.3d 1151 (7th Cir. 1996) the prosecution was unaware of the supposed exculpatory evidence because it was in the possession of other government agencies that had no involvement in the investigation or prosecution of the case. Moreover, the appellant knew as much about the evidence in the possession of the independent agencies as did the government, because he had been in litigation with some of them.

In United States v. Wilson, 901 F.2d 378 (4th Cir. 1990), the appellant was charged with illegally exporting weapons to Libya. He was acquainted with witness Brill and her boyfriend, a CIA agent. The appellant contended that the government failed to disclose evidence that Brill had told the United States attorney that the agent intended to "set up" the appellant. There was no

Brady violation because Brill was available to both sides, it would have been natural for the appellant to have interviewed her because of her closeness to him and to the agent and, therefore, her exculpatory testimony about the agent's intent was equally available to him.

In United States v. Aichele 941 F.2d 761 (9th Cir. 1991), there was no Brady violation because the prosecution turned over the exculpatory evidence during the trial and appellant had a substantial opportunity to use it in his defense.

In United States v. LeRoy, 687 F.2d 610 (2nd Cir. 1982), and United States v. Hicks, 848 F.2d 1 (1st Cir. 1988) the appellants complained that the government failed to disclose grand jury testimony of witnesses and potential witnesses. The Court of Appeals distinguished the statement of a known witness from exculpatory evidence known only to the prosecution. The former is equally available to either side, while the latter is not. United States v. Le Roy, supra, 687 F.2d at 618. There was no Brady violation because the appellants were aware of the witnesses and could have interviewed them and called them at trial. Brady would require disclosure, however, if the defense could not interview the witnesses or needed the testimony to impeach them or refresh their recollections. United States v. Hicks, supra, 848 F.2d at 4.

In State v. Beaty, 158 Arizona 232 (1988), the prosecution took blood samples and tested them. The tests produced incriminating PGM results. The samples were preserved but slides made from them were not. The case involves the rules governing

preservation of evidence set forth in Arizona v. Youngblood, 488 U.S. 51 (1988) and does not involve the failure to disclose exculpatory evidence at all.

Turner v. State, 684 N.E.2d 564 (1997), involved a charge of murder and defense of intoxication. The appellant's blood had been taken at a hospital. On appeal, he argued that the prosecution had not disclosed to him the result of the test. The appellant knew he had been taken to the hospital and a police log available to him showed that he had had his blood taken there. Accordingly, the results of the test were available and he could have obtained them from a neutral source, the hospital. Moreover, the evidence was held not to be material because there was overwhelming evidence that the appellant was in fact intoxicated.

This review of the cases upon which Petitioner relies shows that they offer him no support. In each of them the evidence, if material at all, was known to the accused, or was in his possession, or was in the possession of what this Court has called a "neutral source." United States v. Agurs, supra, 427 U.S. at 111. In none of them was the exculpatory evidence - like the positive for PCP test result here - maintained in the files of the prosecution itself, unknown to the defense and undisclosed.

CONCLUSION

Once Petitioner's mischaracterization of the facts and applicable law are set aside, his argument why his Petition for Writ of Certiorari should be granted boils down to this: He wants this Court to reweigh the evidence which the California Supreme

Court, applying established United States Supreme Court precedent, found to have demonstrated a clear prejudicial failure by the prosecution to disclose material exculpatory evidence to the defense. This is not a reason for granting a Writ of Certiorari. Rule 10, Rules of the Supreme Court of the United States. The Petition should be denied.

Dated: September 30, 1998

Michael M. Crain

MICHAEL M. CRAIN
Attorney for Respondent in California Supreme Court and United States District Court - Central District